

D&O Policy Covers Wrongful Termination Claim Against Entity But Not Officer

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A federal district court, applying Minnesota law, has held that a D&O policy afforded coverage for a wrongful termination claim against the insured entity but not an officer of the company because, under Minnesota law, a wrongful termination claim will not lie against a corporate officer unless he acted outside the scope of his employment. *Gulf Ins. Co. v. Skyline Displays*, 2005 WL 670550 (D. Minn. Mar. 22, 2005).

The court also held that the policy did not cover the breach of fiduciary duty claim against the officer. Finally, the court held that a disputed factual issue precluded summary judgment as to what portion, if any, of an \$8 million payment to the underlying plaintiff in exchange for the plaintiff's shares of stock in the company was covered "loss" under the policy.

The dispute concerned coverage under a D&O policy for underlying litigation between the chairman of the board of a closely held, insured company and the president of that company. After a dispute arose between the chairman and president of the company, following which the members of the board resigned leaving only the president and chairman as directors, the chairman delivered a memorandum to the president informing him that he was relieving him of his management responsibilities. The president and his wife (vice president of sales) commenced an action against the chairman and later added the company as a defendant. The complaint alleged wrongful termination and breach of fiduciary duty. The parties ultimately reached a settlement agreement "[i]n full, final and complete settlement of all claims."

The settlement required the company to pay \$8 million to purchase the shares of the company owned by the former president and his family. The settlement also required the chairman to make a cash payment of \$1.4 million.

The court determined that the policy provided coverage to the company, but not to the officer, for the wrongful termination claim. The court noted that an endorsement to the policy "specifically preserved" coverage for employment claims brought against the company. The court held, however, that the insurer's duty to indemnify the company for this claim did not extend to the chairman because the wrongful termination claim only referenced conduct of the company. The court also explained that "[i]n Minnesota, a wrongful termination claim will not lie against a corporate officer unless he acted outside the scope of his employment," and there was no such allegation here.

The court next held that the policy did not provide coverage to the chairman for the alleged breach of fiduciary duty. The court explained that the policy covered only "wrongful acts" and that this includes acts by directors or officers "in their respective capacities as such." The court stated that "unless the [underlying plaintiff's] breach of fiduciary duty claim is based at least in part on a duty owed or action taken by [the chairman] as a director or officer, there is no coverage under the policy." The court reasoned that the underlying litigation alleged breach of fiduciary duty against the chairman in his capacity as a shareholder of the company, not as an officer. The court also noted that the chairman did not have the power to remove an officer and was thus acting outside his capacity as an officer.

The court next held that the settlement "encompassed every claim asserted against [the company] in the amended complaint," including the covered one. Accordingly, the court held that the entire settlement was covered.

The court concluded, however, that there was a genuine dispute as to whether the \$8 million payment for shares of the company's stock resulted in a covered loss. The insurer argued that the company suffered no loss in its settlement in light of the fact that the settlement included a simultaneous disbursement of cash and receipt of the same value of stock. The company argued that there were in fact two deals—one to repurchase the stock for \$6.67 million and one to settle the litigation for \$2.7 million. According to the company, the parties allocated \$8 million to the stock purchase for tax reasons and the company therefore suffered a loss of \$1.33 million when it paid \$18 million for the stock. The court concluded that there was a genuine issue of material fact on this issue precluding summary judgment as to the amount, if any, of the company's loss.

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